IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

APRIL BUSHEY, on behalf of A.B.,

Plaintiff,

v. Civil Action No. 8:13-CV-1154 (DEP)

CAROLYN A. COLVIN, Commissioner of Social Security,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

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ARTHUR P. ANDERSON, ESQ.

FOR DEFENDANT

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Special Assistant U.S. Attorneys

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on September 8, 2014, during a telephone conference held on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: September 10, 1024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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APRIL BUSHEY, ON BEHALF OF A.B.,

vs. 13-CV-1154

COMMISSIONER OF SOCIAL SECURITY.

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Transcript of *DECISION* held on September 8, 2014, at the James Hanley U.S. Courthouse, 100 South Clinton Street, Syracuse, New York, the HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff:
(Via Telephone)
ANDERSON LAMB AND ASSOCIATES PC
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BY: ARTHUR P. ANDERSON, ESQ.

For Defendant:
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BY: SANDRA M. GROSSFELD, ESQ.

(In chambers, via telephone:)

THE COURT: I thank you both for excellent presentations.

I have before me a request for review of a Commissioner's determination pursuant to 42, U.S. Code, Section 405(g).

By way of background, the infant plaintiff, I'll refer to her as, was born in November of 2000. She's now 13. She was 9 when her application was filed and 11 at the time of the hearing in this matter. At the time of the hearing she was in sixth grade. She was in Malone middle school and not in special education classes.

She treats with her regular pediatrician, Dr. Benardot. She is not seeing a psychiatrist, although she does receive counseling from a therapist. She has been diagnosed with attention deficit and hyperactivity disorder -- or ADHD -- or at least with symptoms of that, as well as oppositional defiant disorder. She's treated with various medications, including currently Concerta and previously Adderall.

Procedurally, she applied for -- or her mother applied on her behalf for supplemental security income benefits on June 10, 2010, alleging an onset date of January 1, 2009. An administrative hearing was conducted by Administrative Law Judge Carl Stephan on December 14, 2011.

ALJ Stephan issued a decision on December 22, 2011, finding that the infant plaintiff was not disabled at the relevant times and denying her benefits. That became a final determination of the agency when the Social Security Administration Appeals Council denied review on July 15, 2013.

In his decision ALJ Stephan, who I have a high regard for, went through the analysis required for childhood disability, did not find that the plaintiff meets or medically equals any of the various listed presumptively disabling conditions that he referenced with regard to her conditions.

And then went to the functional equivalent analysis, finding that the plaintiff had less than marked limitations in the domains of acquiring and using information, attending and completing tasks, caring for oneself, found no limitations in the domain of health and physical well-being and found marked limitation in the area of interacting and relating with others. Also found no limitations in moving and manipulating objects and concluded that there was no functional equivalence.

Obviously, the Court's review is extremely deferential. My role is to determine whether the Commissioner's decision was supported by substantial evidence and was the product of proper legal principles being applied.

Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. I understand completely that it's not the Court's function to weigh evidence. It is the administrative law judge's prerogative.

First, turning to the new evidence argument. New evidence to be considered as having been properly submitted and relevant must be new material and not cumulative and must relate to the period on or before the administrative law judge's decision. I don't believe that the records that were submitted to the Appeals Council fall into that category and so I don't find any error in that regard.

I similarly don't find a failure to develop the record. The administrative law judge had the benefit of Dr. Benardot records and, although he did not submit what we would typically see as a functional residual functional capacity or functional analysis, none the less, I don't find that the ALJ had a duty to recontact Dr. Benardot.

Turning to the issue of functional equivalence because I don't understand plaintiff to be arguing that the plaintiff meets or medically equals any of the listed determinations, functional equivalence is the next issue. Obviously, it's well-established that, under the Social Security Act and the Commissioner's regulations, there are six domains to be considered.

A finding of an extreme limitation in one or a finding of marked in two or more requires a finding of functional equivalence. A marked limitation exists when the impairment interferes seriously with the claimant's ability to independently initiate, sustain or complete activities.

A marked limitation may arise when several activities or functions are impaired or even when only one is impaired, as long as the degree of limitation is such as to interfere seriously with the ability to function, based upon age appropriate expectations, independently, appropriately effectively and on a sustained basis.

An extreme limitation is one that interferes very seriously with the claimant's ability to independently initiate, sustain or complete activities. The focus really of our discussion has been on the domain of caring for oneself.

Again, I completely agree with the Commissioner that it is the prerogative of the administrative law judge to evaluate the evidence and make a determination.

In this case there really is a limited font of evidence bearing on this issue. There is Dr. Hartman's evaluation. However, that occurred in October of 2008, even before the alleged onset date in this case. We have Dr. Alpert's non-examining consultative report. We have reports from Ms. Van Riper, the fifth grade teacher for the

plaintiff, and Ms. Brown, the sixth grade teacher. We have Dr. Benardot's notes and there are some other educational records but those are primarily the sources of information that bear on this domain.

The domain of caring for oneself is defined as follows: We consider how well you maintain a healthy emotional and physical state, including how well you get your physical and emotional wants and needs in appropriate ways; how you cope with stress and changes in your environment; and whether you take care of your own health, possessions and living area.

I know that ten people might review this record and arrive at different results and four may go one way and six may go the other way and, again, I know it's the prerogative of the Commissioner in the end to weigh that.

However, I can't overlook the fact that both the fifth grade teacher, Ms. Van Riper, and the sixth grade teacher, Ms. Brown, answering questionnaires in this domain that are on a form prepared by the Social Security Administration, found serious problems in two domains, according to Ms. Brown, and -- I'm sorry, I shouldn't say domains -- two areas within this domain. That's at Page 201. And at Page 210, Ms. Van Riper found very serious problems in one, two, three, four of the ten factors or categories within this domain and when I consider that and those being people

who are perhaps most familiar with the plaintiff, certainly the most contemporaneous of all of the records other than Dr. Benardot, I would have looked for a more rich discussion from Administrative Law Judge Stephan as to why he ruled out a marked limitation in this area. And his discussion is one paragraph and his discussion of Ms. Brown and Ms. Van Riper's determinations basically are limited to two sentences.

So, this is a case that I think falls squarely within one that was cited by the plaintiff, *Woodall versus Colvin*. It's not reported but it's 2013 WL 4710516 from the Northern District of Ohio, August 29, 2013.

I think that on remand with a fuller discussion, this administrative law judge, or whoever is assigned to the case, may well reach the same conclusion but I find that the decision of the ALJ does not give sufficient rationale for his determination, particularly in this domain, to permit meaningful judicial review.

So I will grant judgment on the pleadings to the plaintiff. I will remand without a finding of disability for further proceedings consistent with this decision.

Again, I thank you both. I will issue a decision shortly memorializing this determination.

SPEAKER 2: Thank you, your Honor.

DEFENSE COUNSEL: Thank you, your Honor.

THE COURT: Thank you.

(Proceedings adjourned, 4:25 p.m.)

C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

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DIANE S. MARTENS, FCRR